United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6118

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

REVEREND DONALD L. JACKSON,

Plaintiff-Appellant

v.

THE STOLER FOUNDATION; CAMERON BAIRD FOUNDATION; THE BAIRD FOUNDATION; THE BUFFALO FOUNDATION; WILLIAM J. CONNERS FOUNDATION; JAMES H. CUMMINGS FOUNDATION; HARRY DENT FOUNDATION; FERGUSON FOUNDATION, INC.; JOSEPHINE GOODYEAR FOUNDATION; JULIA R. and ESTELLE L. FOUNDATION, INC.; THE MARGARET L. WENDT FOUNDATION; THE FARNY R. and GRACE K. WURLITZER, INC.; FRED L. EMERSON FOUNDATION, INC.; WILLIAM J. REGAN, Judge of the Erie County Surrogate Court; MARIO A. PROCACCINO, Commissioner of Taxation and Finance, State of New York; LOUIS J. LEFKOWITZ, Attorney General, State of New York; WILLIAM E. SIMON, Secretary of Treasury; DONALD L. ALEXANDER, Commissioner, Internal Revenue Service; H.B. MOSHER, District Director of Internal Revenue, Buffalo, New York;

Defendants-Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL APPELLEES, WILLIAM E. SIMON, Secretary of Treasury; DONALD L. ALEXANDER, Commissioner, Internal Revenue Service; H.B. MOSHER, District Director of Internal Revenue, Buffalo, New York

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the instant suit by a black individual, seeking a mandatory injunction and declaratory relief to force high Treasury officials to withdraw tax exemptions and to assess taxes respecting numerous charitable foundations, should be dismissed for lack of jurisdiction on the alternative grounds:

(a) That such nontaxpayer suits challenging the tax benefits extended to other taxpayers were not intended by Congress to be justiciable;

(b) That plaintiffs have no standing to bring this suit;

(c) That this suit is barred by the Anti-Injunction Act (26 U.S.C. § 7421(a)), and by the tax exception to the Declaratory Judgment Act (28 U.S.C. §§ 2201-2202); and

(d) That this suit is barred by sovereign immunity.

2. Whether, assuming the District Court had jurisdiction over the federal defendants, the District Court properly granted summary judgment because plaintiff failed to file counter-affidavits establishing racial discrimination.

STATEMENT OF THE CASE

Reverend Donald L. Jackson (plaintiff) appeals from the judgment dismissing his complaint against all named defendants, entered by the United States District Court for the Western District of New York (Honorable John T. Curtin) on July 18, 1975. (Order.) Timely notice of appeal was filed on July 24, 1975. (Notice of Appeal.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

Plaintiff originally commenced this action in the Western District of New York against 13 charitable foundations headquartered in Buffalo, New York seeking injunctive and declaratory relief, damages, revocation of their tax exempt status under the

Internal Revenue Code, and forfeiture of their assets to the United States Treasury. The complaint alleged that the foundations all refused to give grants to Plaintiff and his children, refused to hire Plaintiff as a director, and refused to give money to Plaintiff's foundation on account of Plaintiff's race. The District Court dismissed the complaint on the pleadings, and Plaintiff appealed to this Court.

In Jackson v. Statler Foundation, 496 F. 2d 623 (1974) (petition for rehearing en banc denied, 496 F. 2d 636), this Court affirmed the dismissal as to Plaintiff's request that all assets of the foundation be turned over to the United States Treasury (496 F. 2d 636), but reversed and remanded the case to the District Court. This Court noted that the District Court had jurisdiction to consider Plaintiff's challenge to the foundations' tax exempt status, but that his complaint was deficient in that it failed to name the Secretary of the Treasury as a defendant. This Court ordered the District Court to allow an amendment to the complaint to joint the Secretary as a party. 496 F. 2d, p. 626.

On March 29, 1974, the District Court granted Plaintiff's motion to amend his complaint, adding the federal appellees as party defendants (William E. Simon, Secretary of Treasury; Donald L. Alexander, Commissioner of Internal Revenue; H.B. Mosher, District Director, Internal Revenue Service, Buffalo, New York). That complaint, served on the federal appellees on April 17, 1974, asserted various jurisdictional grounds, including 28 U.S.C.

Section 1343, 42 U.S.C. Section 1381, et seq., 28 U.S.C. Section 2201 (commonly known as the Declaratory Judgment Act), and the Internal Revenue Code of 1954 (26 U.S.C.). (Amended Compl. par. 1).[1/] The amended complaint, following this Court's prior opinion in this case, alleged that the operation of the foundations constituted "state action," and that the foundations discriminated against appellant and his family[2/] on the basis of race. The alleged discrimination was that each of the appellee foundations refused to employ Plaintiff, refused to distribute its funds to members of the black race, refused to invest its assets in minority businesses operated by Plaintiff, and that the appellees conspired against Plaintiff and members of his class, all on account of race (Amended Compl. pars. 3, 19). The complaint charged that the federal defendants had, in essence, failed to police these foundations to insure that their practices were non-discriminatory, and that such failure denied Plaintiff equal protection of the laws (Amended Compl. par. 22). It was also alleged that some of the foundation defendants had violated "the

1/ "R." references are to the Plaintiff's unnumbered appendix to his brief, which contains only three orders of the District Court. Other references, are to the documents' comprising the record on appeal.

2/ Plaintiff also brought the suit on behalf of all "other racial minority groups as concerns equal employment rights, equal protection of laws, freedom from discrimination in the distribution of public moneys or quasi-public moneys and various other issues related thereto."

congressional and judicial requirement that the application of tax exemption for charitable organizations to hospitals be conditioned upon the demonstration that consideration is given to poor persons in need of hospitalization" -- i.e., that tax exempt private hospitals must not charge indigent patients. (Amended Compl. par. 24.) As for the federal appellees specifically, the amended complaint in effect alleged that they had violated Plaintiff's equal protection rights, while at the same time failing to take actions to prohibit the appellee foundations from discriminatorily granting moneys and making investments "to the exclusion of the plaintiff and his class." (Amended Compl. par. 22.)

As relief, Plaintiff requested that a three-judge court be convened (Amended Compl. par. 25a); that Plaintiff be awarded $6,250,000 in damages under Revised Statues, Section 1979 (42 U.S.C., § 1983), because of his failure to receive funds and loss of business (id., par. 25c); and that he be awarded $150,000 in damages under Section 1983 "for loss of employment" (id., par. 25b); that each member of his class be awarded $10,000 in damages under Revised Statute Sections 1977, 1979, 1980 (42 U.S.C., §§ 1981, 1983, 1985); (id., par. 25d)[3]; and that an order issue directing the federal defendants to audit the foundation defendants' books, declaring that the defendants had violated Plaintiff's constitutional rights and that the foundation defendants have not been tax exempt since 1969, and enjoining the grant of tax exempt status to the defendant foundations and charities (Amended Compl. pars. 4, 25a, 25f).

3/ Plaintiff also sought $25,000 in attorneys fees (Amended Compl., par. 25e).

In the meantime, on March 18, 1974, Plaintiff had filed a virtually identical suit in the United States District Court for the District of Columbia, which was transferred to the Western District of New York, sua sponte. On October 10, 1974, the District Court for the Western District of New York ordered all proceedings in that action (Civil No. 1974-185) be stayed until further order. (R. Fifth page.) Plaintiff's appeal from such stay order was dismissed for lack of jurisdiction by this Court (No. 74-2093) on October 22, 1974. Plaintiff's petition for a writ of certiorari respecting the stay order was denied on February 18, 1975. 420 U.S. 927.

Several of the foundation defendants filed motions to dismiss the amended complaint in the instant action (No. 1971-592), or, in the alternative, for summary judgment (along with supporting affidavits). On October 1, 1974, the federal defendants filed a motion to dismiss, or in the alternative for summary judgment. The grounds for dismissal were that (Deft. Motion 1) the action was barred by sovereign immunity; the court lacked subject matter jurisdiction; Plaintiff lacked standing to sue; and Plaintiff had failed to state a claim upon which relief could be granted. In the alternative, it was asserted (Memorandum in Summary Judgment 3) that the affidavits, interrogatories, and depositions filed in the case showed Plaintiff's factual allegations of discrimination were unfounded.

On October 10, 1974 (R. Fifth-Sixth pages) the court ordered that Plaintiff respond by affidavit not later than December 9, 1974,

showing why the relief sought by the foundations and the federal appellees should not be granted. The court warned Plaintiff (R. Sixth page) that failure to comply with that order could result in the dismissal of the complaint and the imposition of any sanctions provided for in the Federal Rules of Civil Procedure.

Plaintiff failed to comply with the order of October 10, 1974, and on January 7, 1975, the District Court again ordered Plaintiff to respond to the various motions still pending. (R. Second-Third pages.) Plaintiff did not comply with this order. On July 18, 1975, the District Court consolidated Civil No. 1974-185 (the transferred D.C. action) with the instant case, and granted all of the motions to dismiss the complaint. (R. First-Third pages.) It is from this order that Plaintiff appeals.

The factual background of this action may be summarized from the depositions of Plaintiff and the various affidavits filed on behalf of the foundations as follows:

Plaintiff began sending letters to foundations in 1969 seeking funds for investment in minority owned businesses, scholarships for his children, grants for his own private foundation (the Donald L. Jackson Foundation Organization), and employment by other foundations as a director or trustee. (A copy of five of these letters is attached to the motion for summary judgment filed on behalf of The Julia R. and Estelle L. Foundation.) In 1970, Plaintiff also began sending a series of form letters (five to ten different letters (Jackson Feb. 14, 1972 Dep. 19)) to approximately 14,900 foundations (Jackson Feb. 14, 1972 Dep. 20-21), seeking

funds and employment. Plaintiff's letters were, for the most part, form letters addressed either "Dear Foundation" or "Dear Sir". Plaintiff kept no copies of the form letters sent, and no formal records of his contacts with the foundations (Jackson Feb. 14, 1972 Dep. 23). Rather, Plaintiff made vague markings in the Russell Sage Foundation Yearbook (a published compilation of information about American foundations). Plaintiff admits that these markings are unreliable (Jackson Jan. 12, 1972 Dep. 112, 116, 126); for example, he did not even know when the markings were made in the yearbook. At some interval after Plaintiff mailed the form letter to a particular foundation (in one instance five days after mailing the letter (Jackson Jan. 12, 1972 Dep. 67-68)), Plaintiff determined to sue that foundation for discrimination, and in some instances entered the word "charges" next to the name of the particular foundation in the yearbook. (Jackson Jan. 12, 1972 Dep. 67.) Plaintiff admitted that responses to the letters played no part in his decision to sue particular foundations, and stated that his markings in the book meant nothing because (Jackson Jan. 12, 1972 Dep. 68) he had "already planned to sue".

Plaintiff's answers in the various depositions indicate he had no knowledge of discrimination on the part of any of the foundation defendants. He testified that he sued the present defendants rather than other foundations because he thought they were more racist than others (Jackson Feb. 20, 1972 Dep. 76). He stated (Jackson Jan. 12, 1972 Dep. 105-106) that the purpose in sending the letters was to establish a basis upon which to sue

foundations for discrimination. Once he determined which foundations to sue, he made certain that those foundations received at least one mailing. (Jackson Feb. 14, 1972 Dep. 89-90.) However, he could not state with specificity to which foundation he sent which letters, the date when he sent any letters to any particular foundation, the date when he made telephone contacts with any particular foundation, or the substance of any phone conversation except vague impressions of his feelings about the phone conversations. (See, e.g. Jackson Jan. 12, 1972 Dep. 18-19, 25; Jackson Feb. 17, 1972 Dep. 104, 117.) He did not know to what uses the foundations put their funds, and did not consider that relevant. Rather, he asserted that the relevant question in this suit was to whom the foundations did not give money. (Jackson Jan. 12, 1972 Dep. 46.)

Plaintiff explained his theory of his case as follows (id. pp. 49-50):

> Every foundation has to have a certain staff.
> * * *
> Regardless of whether it is paid or not, they have to have a certain staff to meet the requirements under the State of New York even to get the exemption under the state law, and the case I have in mind, and I am quote ,sic, fro Clark against Bethlehem Steel, "It is not necessary to prove that intention to discriminatroy ,sic, employment practice, and all that is necessary to prove intention is demonstration that conduct is not accidental inadvertent, or heedless, or arises from mistake." And it is not mistake that they don't have employees.

At page 91 of that same deposition, Plaintiff further explained after again quoting the same passage from Clark v. Bethlehem Steel[4/]: "Every Foundation has to have directors and if they don't have a Negro director, it is no mistake." Thus, Plaintiff's theory of the case seemed to be that the mere failure of a private foundation to have a black director or employee is discrimination per se.

In response to the amended complaint, several of the foundations filed affidavits in support of their motions to dismiss the complaint. These affidavits stated that the foundation did not discriminate on the basis of race; that the foundation's grants were made strictly in accordance with the governing provisions of the trust creating the foundation, without regard to the race of the recipient; that a substantial number of grants had been made to black or black oriented organizations (see, for example the affidavit of Jane D. Baird, which lists the organizations to which the Cameron Baird Foundation contributed); and that to make individual grants to Plaintiff or scholarship grants to his children would cause the foundation to be subjected to the excise taxes on such prohibited grants provided in Sections 4942 and 4945 of the Internal Revenue Code of 1954. The affidavits showed, inter alia that in some cases Plaintiff had never filed an application for employment with the foundation in question; in one case that when a foundation (The Margaret L. Wendt Foundation) was contacted by Plaintiff, the foundation official told Plaintiff to put his

4/ United States v. Bethlehem Steel Corporation, 312 F. Supp. 977, 993 (W.D. N.Y., 1970), modified and remanded, 446 F. 2d 652 (C.A. 2, 1971).

request in writing, to which Plaintiff responded that he did not have time (Lunt Affidavit 2); and that in no case did Plaintiff ever submit an application for either aid or employment to any foundation (e.g., Frey Affidavit 2 (Julia R. and Estelle L. Foundation)).

Plaintiff did not file counter affidavits or any response whatsoever to these affidavits or any opposition to the various motions to dismiss his complaint.

Plaintiff prosecutes this appeal from the judgment of dismissal, arguing that District Judge Curtin should have disqualified himself, or alternatively that summary judgment was improper and that only the federal and state attorneys general are entitled to represent the foundation defendants. Plaintiff presents no argument respecting the District Court's jurisdiction to issue declaratory or injunctive relief against the federal defendants.

SUMMARY OF ARGUMENT

1. Plaintiff initially brought this suit against thirteen charitable foundations seeking damages, a declaration that the foundations were no longer tax-exempt because they discriminate on the basis of race, and an order that the Internal Revenue Service audit the books of the foundations and assess taxes against them. That suit was dismissed by the District Court, and was appealed to this Court. In Jackson v. Statler Foundation, 496 F. 2d 623, 626 (1974), this Court held that the complaint was deficient in that it failed to join the Secretary of the Treasury as a defendant, and remanded the case to the District Court

in order to allow plaintiff to join various Treasury officials (the federal appellees) and to allow him to attempt to prove that the operation of the foundations constituted "state action".

On remand, plaintiff amended his complaint to include the federal appellees as named defendants. The federal appellees moved to dismiss the complaint against them on several jurisdictional grounds relating to the non-justiciability of non-taxpayer suits to mandate higher tax assessments against others. In addition, the federal appellees moved for summary judgment on the ground that, assuming jurisdiction in the District Court, there was no evidence which would support the alleged racial discrimination by the defendant foundations. The District Court did not address the jurisdictional claims, but granted summary judgment in favor of all defendants.

2. The federal courts are without jurisdiction to mandate withdrawal of tax exemptions and the assessment of taxes in suits by persons whose own tax liabilities are not at issue. Subchapter F of the Internal Revenue Code (26 U.S.C., §§ 501, et seq.), along with numerous administrative and procedural portions of the Code, provide a comprehensive statutory scheme for the exemption of charitable organizations from the federal income tax, and provide for the supervision of such exempt status by the Secretary of the Treasury. This supervisory power vested in the Treasury is only reviewable in the courts if a notice of tax deficiency, or a tax assessment, is entered against the organization or one of its contributors. In such cases, the Code specifically provides the procedures necessary

to provide judicial review and the jurisdictional prerequisites for the maintenance of such a suit. This Court and the Supreme Court have held the federal courts have no jurisdiction to entertain suits by either the organization or contributors for declaratory or injunctive decrees respecting the tax-exempt status of those organizations. Moreover, in Louisiana v. McAdoo, 234 U.S. 627 (1914) and Jr. C. of C., Rochester v. U.S. Jaycees, 495 F. 2d 883 (C.A. 10, 1974), the courts specifically held that the federal courts have no jurisdiction to adjudicate suits by plaintiffs against Treasury officials, seeking to review and increase the tax liabilities of other taxpayers.

On December 10, 1975, the Supreme Court heard oral argument after granting certiorari in Eastern Kentucky Welfare Rights Organization v. Simon (Nos. 74-1110 and 74-1124), on the issue whether the federal courts have jurisdiction over non-taxpayer plaintiffs' suits for injunctive and declaratory relief requiring the Treasury to withdraw tax exemptions of several hospitals because the hospitals' refusal to provide free non-emergency care for indigents. In that case, the D.C. Circuit (506 F. 2d 1278) had held that the federal courts have jurisdiction to adjudicate such suits. Since virtually the same jurisdictional issue is present here -- indeed, plaintiff asserts the same claim respecting denial of tax-exempt status to hospitals which deny free treatment to indigents --the federal appellees filed a motion on December 5, 1975 (denied by this Court on December 31, 1975) to delay further proceedings here until the Supreme Court decision in Eastern Kentucky is handed down. With all respect,

we again suggest that it would be appropriate to delay oral argument in this case until after Eastern Kentucky is decided. Such delay would not prejudice plaintiff in any manner, and would allow all parties to address the effect of that decision on the jurisdictional issues here involved either at argument or in supplemental memoranda.

3.(i) The District Court had no jurisdiction to hear this suit to the extent that it seeks to mandate audits, exemption revocations, and assessments, since the Internal Revenue Code evidences Congress' intent to commit revenue administration to the Treasury Department, to the exclusion of Judicial Branch review save in specifically and narrowly described situations. From the very founding of the Republic, Congress has granted broad powers to the Secretary of the Treasury to assess and collect taxes, and has continually limited judicial scrutiny of the Secretary's actions to statutorily prescribed collection suits, suits for refunds of taxes collected and (later) Tax Court actions. The present Internal Revenue Code, as have past revenue laws, makes it clear that the Secretary of the Treasury alone has the responsibility and the sole discretion to administer the tax laws of the Nation, and sole control over the commencement of suits for the determination, assessment and collection of taxes. The courts have continually held that the statutes precluded suits such as plaintiff's here to require the Treasury to impose taxes on other taxpayers. The only notable exception to this general rule is the D.C. Circuit's Eastern Kentucky decision.

(ii) The District Court also lacked jurisdiction over the claims against the federal appellees, since plaintiff here has no standing to challenge the Treasury's administration of the exempt organization provisions of the Internal Revenue Code. Plaintiff's contention is, in essence, that he, as a private citizen, can force the Treasury to establish an affirmative action, anti-discrimination program as part of its administration of the revenue laws. We submit that the public interest is not served by allowing individuals to bring tax suits for the purpose of obtaining private benefits for particular groups of individuals. In this regard, the enforcement activities and policy decisions of the Treasury are similar to the discretion of a prosecutor in determining which criminal actions to bring. The courts have refused to permit suits to compel prosecutors to enforce even civil rights laws, and have held those prosecutorial decisions immune from judicial review. For the same reasons, the enforcement program of the Secretary of the Treasury -- like that of other public agencies such as the Federal Trade Commission -- should likewise be immune from judicial review in suits by collaterally affected citizens like that here.

(iii) The District Court's jurisdiction over the federal appellees here was also precluded by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. Section 7421(a) of the Internal Revenue Code provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *". The Supreme Court has recently held (Bob Jones University v. Simon,

416 U.S. 725, 736 (1974)) that the quoted language "could scarcely be more explicit", and the Court one-hundred years ago held that the predecessor of Section 7421(a) was meant to prevent judicial interference with the process of collecting taxes. The instant suit clearly attempts to interfere with that process by seeking a judicial order to compel the Secretary to administer the income tax laws in a manner deemed most appropriate and helpful to the plaintiff. Allowing suits such as the instant one would amount to administration of tax policy by the courts rather than by the duly constituted administrative authorities charged with that responsibility. Such a result is clearly outside the intendment of the Anti-Injunction Act; indeed, the prevention of such judicial intrusion into the revenue administration process was in large measure the impetus for the original enactment of the Anti-Injunction Act in 1867. To allow non-taxpayers jurisdiction to affect administrative policymaking and the tax liabilities of others by injunctive suit, where such equity jurisdiction has uniformly been denied to taxpayers seeking only to settle their own tax liabilities, would be anomalous indeed, and would certainly run contrary to the intent of Congress.

The Declaratory Judgment Act, 28 U.S.C., § 2201 bars any declaratory suit "with respect to federal taxes." Even assuming arguendo that the Anti-Injunction Act does not bar non-taxpayer suits, the phrase "with respect to" is clearly sufficiently broad to preclude declaratory suits such as this, and the injunction sought in aid thereof under 28 U.S.C. § 2202. With the exception

of the Eastern Kentucky decision, the courts (including this one) have consistently held that the tax exception in the Act bars suits such as this one in which a plaintiff seeks to obtain a declaratory judgment respecting a federal tax.

(iv) Plaintiff's suit is also barred because it is in effect a suit against the United States to which Congress has not consented. One of the bases of the Supreme Court's Louisiana v. McAdoo decision, supra, was that suits such as this to mandate Treasury administrative actions to require higher assessments against others were in reality unconsented suits against the sovereign. Indeed, the Court could hardly have been more emphatic, asserting that such actions "would operate to disturb the whole revenue system of the Government," and that "Interference [by the courts] * * * would be to interfere with the ordinary functions of Government." That decision has been cited by the Court with approval on many occasions since. Moreover, the underlying rationale of the case has been repeatedly restated in decisions by the Court refusing to imply Congressional consent where, as here, the suit and the relief sought would directly "expend itself on the public treasury," "interfere with public administration," and "require * * * official affirmative action" and "compel * * * the Government to act." Indeed, in Jolles Foundation v. Moysey, 250 F. 2d 166 (1957), this Court held that a suit by a foundation against a revenue official to have its name reinstated on a tax-exemption list was barred by sovereign immunity. Whether the Administrative Procedure Act waives such immunity is not in question here, since that Act

plainly does not authorize the wholesale injunctive review of Executive tax policy which suits such as this would entail.

Accordingly, the District Court was without jurisdiction over the federal appellees. The order of the District Court should be reversed with directions to enter an order dismissing the complaint against the federal appellees for lack of jurisdiction.

4. Assuming, arguendo, that the court below had jurisdiction to consider plaintiff's complaint against the federal appellees, the federal appellees are entitled to summary judgment. Under Rule 56, Federal Rules of Civil Procedure, when a party for summary judgment and supports that motion by affidavits asserting facts, the party against whom summary judgment is sought cannot rest on the allegations in his complaint, but must, by affidavit or otherwise, adduce facts which show a genuine issue of material fact exists which necessitates trial, or suffer summary judgment.

In the case at bar, plaintiff made absolutely no response to affidavits on behalf of the foundations which stated that the foundations do not discriminate in employment practices, the manner in which funds are distributed, or the character of income-producing investments on the basis of race. These statements, coupled with the deposition testimony of plaintiff which demonstrated that his suit was entirely without factual basis, constituted the established facts for the purposes of the summary judgment. With no facts to support the alleged racial discrimination, summary judgment in favor of the federal appellees was appropriate and proper, since the relief sought against the

federal appellees would be proper only if the foundations, in fact, discriminate on the basis of race.

Even had plaintiff responded with the sworn facts of the character generally described in his depositions, he would not have established the requisite discrimination. His alleged job discrimination complaint was based solely on a purported showing that the foundations in suit had no black employees or directors. Nowhere does plaintiff offer to show the four factors which the Supreme Court has held necessary to prove a prima facie case of job discrimination. In contrast, plaintiff's own testimony shows that the sole basis of his complaint is a form letter sent to 15,000 foundations in which he stated he "would like to become a director of your foundation." He also indicated he would prove the alleged distribution and investment discrimination by the introduction of unspecified reports the foundations had filed with the Internal Revenue Service as exempt organizations. Plaintiff never offered to describe these reports or introduce them into evidence, and his testimony concerning his contacts with the foundations seeking funds and investments in minority businesses was vague, confusing and contradictory. Plaintiff could not have established racial discrimination on the part of the foundations, and, since the relief sought against the federal appellees would have to be grounded on such discrimination, the District Court properly granted summary judgment in favor of the federal appellees.

I

INTRODUCTION

Plaintiff, The Reverend Donald E. Jackson, brings this action as a black individual charging that the charitable foundation defendants have intruded on his alleged statutory and Constitutional rights by refusing to hire him as a director, to give scholarships to his children, and to grant money to his foundation, all because of his race. He also brings the suit as a class action on behalf of all similarly situated blacks. He seeks, inter alia, declaratory and injunctive relief which would require the defendant Treasury officials to audit, to withdraw the tax-exempt status of, and to assess federal income and other taxes against, the foundation defendants. And although plaintiff's complaint specifically would mandate such stringent enforcement activities against only the named foundation defendants, it seems obvious that if this Court granted such relief here, the federal defendants would necessarily have to conform their exemption policies nationwide to the court-ordered mandate. Thus, plaintiff's complaint in reality seeks nothing less than a court order mandating the Treasury Department to adopt a broad, detailed, and unprecedented affirmative action non-discrimination program as an integral component of its revenue-raising system.

In his original complaint, plaintiff did not join any federal agency or official as a defendant, and no federal party appeared. The District Court dismissed the original complaint on the

pleadings, for failure to state a claim on which relief could be granted.

On an appeal to this Court, in which again no federal party appeared, this Court held in Jackson v. Statler Foundation, 496 F. 2d 623, 626 (1974) that --

> the complaint, insofar as it seeks revocation of the * * * [plaintiffs'] federal * * * tax exempt status, is deficient on its face for failure to join the Secretary of the Treasury * * *, who would be [an] indispensable part * * *[y] to a suit for such relief. * * *. Moreover, * * * [plaintiff] has not alleged facts which would give him standing to challenge past employment and investment patterns, failing to show how he personally has been affected by these practices. * * * Since * * * [plaintiff] is appearing pro se, we leave these matters for the district court to deal with on remand, without prejudice to motions to join necessary parties and to amend the complaint to allege additional facts. (Emphasis in original.)

The court's decision thus obviously held that the case should be remanded for possible joinder of the Secretary of the Treasury, and presumably a hearing on the Secretary's defenses. In a brief one-line paragraph that followed, however, the majority opinion stated that "This court has jurisdiction to consider appellant's challenge to appellees' tax exemption. See McGlotten * * * [v. Connally], 338 F. Supp. [448] at 452-54 [D.C. D.C., 1972]." The latter statement, of course, was not necessary for the decision, and in any event could not be binding on any federal agency or official, since none was a party to the suit.

On remand, plaintiff amended his complaint to join the Secretary of the Treasury, the Commissioner of Internal Revenue, and the District Director of the Buffalo, New York District of

the Internal Revenue Service. These Treasury defendants promptly moved to dismiss plaintiff's complaint against them for lack of jurisdiction, on the grounds that (1) Congress has expressly authorized, in a whole panoply of statutes (including Code Section 7401) the Secretary of the Treasury to assess and collect taxes and otherwise administer the revenue laws, to the total exclusion of judicial review save in collection, refund, Tax Court and other statutorily authorized actions; (2) that plaintiffs lacked standing to enjoin Treasury officials to audit returns, to withdraw exemptions, and to assess taxes; (3) that the instant suit against the Treasury officials is specifically precluded by the tax Anti-Injunction Act (Section 7421(a) of the Internal Revenue Code of 1954, Appendix, infra) and the tax exception to the Declaratory Judgment Act (28 U.S.C. §§ 2201-2202, Appendix, infra); and (4) that this suit against the Treasury officials is in actuality a suit against the United States to which the sovereign has not given the required consent (Deft. Motion to Dismiss.) In addition, the defendant Treasury officials moved for summary judgment on the ground that, assuming the District Court had jurisdiction, plaintiff has failed to demonstrate the existence of any evidence which is legally sufficient to prove racial discrimination by the defendant foundations. (Id., Supporting Memorandum, 18-20.)

The District Court did not address the Government's jurisdictional defenses, but instead granted summary judgment on the

ground defendants' affidavits established that no racial discrimination existed, and that the plaintiff had not filed counter-affidavits contradicting defendants' affidavits to that effect. In the interests of logical presentation, however, we shall first set forth the Government's jurisdictional defenses, which are purely legal, in Point II, infra.[5] In Point III, infra, the propriety of the District Court's grant of summary judgment will be treated.[6]

5/ We will not treat plaintiff's argument that Judge Curtin should have recused himself, since that argument is irrelevant if plaintiff's claims for relief against the federal defendants are non-justiciable. Similarly, plaintiff's request for a three-judge court is to no avail if the District Court had no jurisdiction. E.g., Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962); see Alexander v. "Americans United", Inc., 416 U.S. 752 (1974). In any event, plaintiff's Constitutional claims are plainly insubstantial.

6/ Plaintiff's damage claims are aimed only at the foundation defendants, not the federal defendants. (See Jackson, Jan. 12, 1972 Dep. 53-54.) Moreover, it is not clear whether plaintiff continues to press the damage claims at all. (Id., p. 55.) In any event, the statutes recited in plaintiff's complaint in no way authorize money damage suits against the United States. Only Revised Statutes, Section 1980 (42 U.S.C. § 1985(3)) even purports to authorize damages, and that statute does not apply where, as here, it is not alleged that the federal officials are not acting under color of federal law. Williams v. Halperin, 360 F. Supp. 554, 556 (S.D. N.Y., 1973) (citing cases); Moore v. Schlesinger, 384 F. Supp. 163, 165 (Colo., 1974); Cf. Revis v. Laird, 391 F. Supp. 1133, 1138, 1139-1140 (E.D. Calif., 1975). Plaintiff's contention that only the federal and state Attorneys General may represent the foundation defendants is frivolous and will not be argued further.

II.

THE FEDERAL COURTS HAVE NO JURISDICTION TO MANDATE WITHDRAWAL OF TAX EXEMPTIONS AND ASSESSMENT OF TAXES IN EQUITY SUITS BROUGHT BY PERSONS WHOSE OWN TAX LIABILITIES ARE NOT AT ISSUE

Section 501(c)(3) of the Internal Revenue Code, Appendix, infra, provides an exemption from income taxes for organizations "organized and operated exclusively for religious, charitable, * * * or educational purposes * * *." Section 170(c)(2) of the Code, Appendix, infra, substantially expands the tax benefits associated with such organizations by allowing income tax deductions for "charitable contribution[s]" thereto. As the prior opinions of this Court in the case detail, these basic statutes allowing tax benefits to charitable organizations are buttressed, limited, and regulated by a major array of attendant statutes and Treasury Regulations.[7] In particular, Section 508(a) of the Code provides that most organizations seeking tax-exempt status must apply to the Treasury Department for an exemption ruling letter as a form of notice. See § 1.508-1 of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.). Under Code Section 6033 (26 U.S.C.), most exempt organizations

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7 For example, Sections 170 and 501(c)(3) themselves contain prohibitions against lobbying activities and political campaign activities. Code Sections 642(c), 2055(a), 2106(a)(2) and 2522(a) similarly allow charitable deductions by trusts, and deductions from estate and gift tax for charitable contributions. Code Sections 511-513 provide for the taxation of the unrelated business income of charitable organizations. Code Sections 3101, 3121(b)(8)(B), 3301 and 3306(c)(8) provide for exemptions of tax-exempt organizations from the payment of Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes, and Code Sections 4940-4948 impose numerous requirements, taxes and penalties on certain private foundations.

must also file detailed annual returns for the Treasury's information. Moreover, detailed administrative appeals procedures must be followed before the Internal Revenue Service may revoke an exemption ruling letter. Rev. Proc. 72-4, 1972-1 Cum. Bull. 706; Bob Jones University v. Simon, 416 U.S. 725, 730 (1974).

The only circumstances in which this general Treasury supervision of exempt organizations is reviewable in the courts are if a notice of tax deficiency, or a tax assessment, is entered against the organization or one of its contributors. In those events, the organization or contributor may litigate the proposed or actual assessment in a Tax Court action[8/] or District Court (or Court of Claims) refund suit, or in a collection suit, and in the process obtain judicial review of the tax-exempt status of the organization. The Supreme Court, in accord with this Court's decision in Jolles Foundation v. Moysey, 250 F. 2d 166 (C.A. 2, 1957), has recently held, however, that the federal courts have no jurisdiction to entertain suits by the organization itself, or contributors thereto, seeking declaratory or injunctive decrees respecting the tax-exempt status of the organization. Bob Jones University v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United", Inc., 416 U.S. 752 (1974). The Court there held that the

8/ Since the Tax Court has no jurisdiction over excise (e.g., Code Sections 4940-4948) or withholding (e.g., Code Section 3101) F.I.C.A. taxes, the issue of tax-exempt status arising out of such tax assessments could only be litigated in refund suits in District Courts or the Court of Claims. See, e.g., Alexander v. "Americans United", Inc., 416 U.S. 762-763, fn. 13 (1974).

long-standing, Congressionally mandated exemptions of the Treasury Department from judicial review, apart from the assessment and collection process, must take precedence over even the plaintiffs' assertions there of the need for injunctive and declaratory relief to protect Constitutional rights involving racial discrimination, religious freedom and freedom of speech. The same result was even more recently reached in United States v. American Friends Service Comm., 419 U.S. 7 (1974), in which the Court held that the rule proscribing injunctive litigation respecting tax determinations applies, even where the taxpayer-plaintiffs have alleged that the determinations infringe on their Constitutional free exercise rights, and as a practical matter they would never have an opportunity to litigate the Constitutional issue in a Tax Court, refund or collection action.

In the Jolles Foundation, Bob Jones, "Americans United", and American Friends cases, the plaintiffs were all persons against whom assessments might be entered, and who at least theoretically 9/ might be able to litigate the Constitutional issue in a refund or Tax Court action. However, in Junior C. of C.,

9/ In Jolles Foundation, however, this Court precluded injunctive or declaratory relief even though the Foundation asserted that "it had no income upon which a tax might be laid" (Br. for the Appellant, Jolles Foundation v. Moysey, supra, p. 16), so that a refund or tax action was as a practical matter unlikely. We have noted in the text the virtual impossibility of the American Friends plaintiffs' litigating their Constitutional claim in a refund, Tax Court, or collection action, since they admitted they owed the tax, but challenged only the withholding procedure by which it was collected.

Rochester, Inc., N.Y. v. U.S. Jaycees, Tulsa, Okla., 495 F. 2d 883 (C.A. 10, 1974), cert. denied, sub nom. Junior Chamber of Commerce of Philadelphia v. United States Jaycees, 419 U.S. 1026 (1974), several women brought a class-action suit, alleging that the Jaycees' exclusion of women constituted unconstitutional discrimination under the Fifth and Fourteenth Amendment of the Constitution of the United States, and sought declaratory and injunctive relief requiring the Treasury Department to withdraw the Jaycees' tax exemption. The court ordered the suit dismissed on the ground that it was barred by the Anti-Injunction Act, the tax exception to the Declaratory Judgment Act, and sovereign immunity, even though the plaintiffs could of course never litigate the issue in refund, Tax Court, or collection actions. 495 F. 2d, pp. 888-889.

At about the same time, a suit presenting analogous issues was proceeding in the District of Columbia Circuit. In Eastern Kentucky Welfare Rights Organization v. Simon, 506 F. 2d 1278, cert. granted, Nos. 74-1110 and 74-1124 (May 19, 1974), plaintiffs, a group of welfare recipients and organizations, brought a class action suit alleging that the Treasury Department's refusal to require exempt hospitals to provide free non-emergency care for indigents constituted a violation of the plaintiffs' rights under federal tax-exemption and health care statutes and policies. Although no taxes of plaintiffs were involved, plaintiffs sought declaratory and injunctive relief requiring the Treasury Department to withdraw tax exemption benefits from hospitals

which did not meet the requirements asserted by plaintiffs. The District of Columbia Circuit held that the federal courts have jurisdiction to hear such non-taxpayer suits, but held against plaintiffs' claims on the merits. The Supreme Court granted the plaintiffs' and the Government's petitions for certiorari, presumably to resolve the conflict with the Jr. C. of C. case, and oral argument was heard on December 10, 1975.

The Bob Jones, "Americans United", American Friends, Jr. C. of C. and Eastern Kentucky cases were all handed down subsequent to this Court's revised opinion in the prior appeal. To the extent that this Court's majority opinion on the prior appeal may have rested on the District Court's decision in McGlotten v. Connally (now Simon), supra, it was premature, since that case is still pending in the District Court and no final decision has yet been entered from which the Government can appeal. Green v. Kennedy, 309 F. Supp. 1127 (D.C. D.C., 1970), subsequent proceedings sub nom. Green v. Connally, 330 F. Supp. 1150 (D.C. D.C., 1971), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), which was a suit brought by Mississippi black parents to disallow tax exemption benefits to white schools undermining court-ordered integration, is also of little, if any, precedential significance here. There the Treasury Department voluntarily changed its exemption policy to exclude racially discriminatory schools during the trial court proceedings; as a result, the Supreme Court in Bob Jones stated (p. 740, fn. 11) that "the Court's affirmance

in Green lacks the precential weight of a case involving a truly adversary controversy."

In the meantime, numerous declaratory and injunctive suits against Treasury officials, seeking withdrawal of tax exemptions or other tax benefits from other taxpayers, are pending in District Courts and Courts of Appeals throughout the country, awaiting the Eastern Kentucky decision.[10] Since the instant case also involves the jurisdiction of a federal court to adjudicate a suit by a plaintiff whose own tax liabilites are not involved, and who is seeking to vindicate his alleged statutory and Constitutional rights by requiring the Treasury Department to assess higher taxes against other taxpayers, Eastern Kentucky is of major, if not controlling, significance. Indeed, plaintiff here presses virtually the same substantive contention at issue in Eastern Kentucky -- that the foundation defendants violate the tax exemption provisions by giving grants to hospitals which do not furnish free care to indigents. (Amended Compl., par. 24.) It is for that reason that the federal defendants moved (on December 5, 1975) to have further briefing and oral argument in this case held in abeyance until after the Supreme Court's decision in Eastern Kentucky is handed down this spring. That motion was denied, however, on December 31, 1975. With all

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10/ For example, American Society of Travel Agents v. Simon (C.A. D.C., No. 75-1782), is a suit by travel agents seeking withdrawal of the tax-exempt status of the American Jewish Congress because of the latter organization's extensive sponsorship of tours. Tax Analysts and Advocates v. Simon (C.A. D.C., No. 75-1304), is a suit by a domestic oil well owner seeking to prevent the Treasury Department from allowing the foreign tax credit respecting certain foreign taxes paid to OPEC nations.

deference, we suggest again that it would be appropriate to delay oral argument here until after Eastern Kentucky is decided. Indeed, the decision in that case may well call for supplemental memoranda by counsel here to discuss the application of that opinion to the facts at bar.

In view of these background factors, and keeping in mind that a full exposition of the Government's position on the jurisdictional issues involved here required 50 printed pages of argument in Eastern Kentucky, we will attempt to set forth our position here in rather summary fashion. Since an opinion here is unlikely before Eastern Kentucky is decided, a supplemental memorandum respecting the latter opinion will hopefully obviate the necessity for such extended argument.

A. Congress' statutory system for administering the revenue laws, together with the historical and inherent functions of the Executive as contrasted with the Judicial Branch, preclude injunctive suits to increase assessments against other taxpayers

An analysis of the present Internal Revenue Code, and the revenue statutes going back to the very founding of the Republic, provides overwhelming evidence that Congress never intended to give the Judicial Branch power to entertain suits such as that here, which would require the Treasury Department to impose higher internal taxes on other taxpayers. No doubt remembering

its own inability to raise sufficient revenue under the prior Articles of Confederation, and pursuant to its broad Constitutional power to "lay and collect Taxes, Duties, Imposts and Excises" (Art. I, Sec. 8), Congress provided in 1792 that "The Secretary of the Treasury shall direct the superintendence of the collection of the duties on impost and tonnage as he shall judge best." Act of May 8, 1792, c. 37, 1 Stat. 279, Sec. 6 (emphasis supplied).

By contrast, it was the view of James Madison, as a member of the First Congress and a key leader in establishing the revenue administration system, that the role of the Judicial Branch would be limited to considering "the claims and accounts subsisting between the United States and particular citizens"[11/] -- the system which Congress eventually enacted by means of refund and collection suits and (later) Tax Court actions.

This sweeping grant of statutory authority to the Treasury to administer the revenue laws has in substance been continued and multiplied down to the present day in statutes too numerous to detail in full here. Possibly most important, Section 7801 of the 1954 Code provides that "Except as otherwise expressly provided by law, the administration and enforcement of * * * [the revenue laws] shall be performed by or under the supervision

11/ 1 Annals of Congress (1834 ed.), p. 612; see id., pp. 386-389, 592-602, 612-614.

of the Secretary of the Treasury." This general authority was concretized in the century-old Code Section 6201 and its predecessors, giving the Secretary the vital and sweeping authority "to make the [1] inquiries, [2] determinations, and [3] assessments of all taxes * * * imposed by this title." Other equally ancient Code provisions indicate the broad parameters of these authorizations, by expressly empowering the Secretary or the Commissioner to refund or credit taxes erroneously or illegally collected (Sec. 6402); to compromise all civil and criminal internal revenue cases (Sec. 7122); to enter into final and conclusive (absent fraud or the like) closing agreements respecting tax liabilities, for both past and prospective transactions (Sec. 7121); and to abate excessive, illegal or erroneous assessments, free from review by any other administrative or accounting official (Section 6404). Finally, to make it clear that these powers are not to be shared, Code Section 7401 provides that "No civil action for the collection or recovery of taxes * * * shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced."

On the basis of these extensive statutory grants of authority both to assess and refrain from assessing taxes, it was held in Wolkstein v. Port of New York Authority, 178 F. Supp. 209 (N.J., 1959) that the federal court had no jurisdiction to

review the Commissioner's action in permitting tax-exempt status for the Port of New York Authority and its revenue bonds. Accord, United States v. Western Pac. R. Co., 190 F. 2d 243, 248 (C.A. 9, 1951). Similarly, in Dorsheimer v. United States, 7 Wall. 166 (1868), the Court held that no jurisdiction existed to hear a complaint brought by an informer challenging the Secretary's remission of a fraud penalty (which resulted in nullification of the informers' reward). The Court reasoned that the case involved "the exercise of * * * [the Secretary's] discretion in a matter intrusted to him alone, and from which there could be no appeal" (id., p. 175). Similarly, the Court has consistently held that, absent fraud or mistake appearing on the record, no other officer of the Federal Government may obtain judicial review to overrule the Commissioner's action in allowing a refund of a tax. E.g., United States v. Kaufman, 96 U.S. 567 (1877); United States v. Savings Bank, 104 U.S. 728 (1881); United States v. Louisville, 169 U.S. 249 (1898).

For at least the nation's first century, these statutes were generally understood to preclude suits such as that here to require the Treasury to impose taxes on other taxpayers. However, in Louisiana v. McAdoo, 234 U.S. 627 (1914), Louisiana, as a producer of domestic sugar on its prison farms, brought suit to require the Treasury secretary to rule that a higher tax applied to imported sugar. The Supreme Court unanimously dismissed the suit for lack of jurisdiction, holding that such non-taxpayer suits "would operate to disturb the whole

revenue system of the Government," and that "Interference [by the courts] in such a case would be to interfere with the ordinary functions of government." Louisiana v. McAdoo, 234 U.S. 627, 632.633 (1914).[12/]

The wisdom of the Louisiana v. McAdoo holding is confirmed by both reason and Congressional practice. Numerous factors require the Secretary of the Treasury to have maximum discretion in administering revenue collection: the absolute importance of such revenues; the universal direct, collateral and drastic effects of taxes on all persons; the necessity for swift action, intricate correlation and unitary control of administrative interpretations and acts; and the persistent need to marshal limited administrative resources for maximum revenue production.

12/ In Louisiana v. McAdoo, supra, the Court was well aware of the unprecedented nature of the suit. As Solicitor General Davis stated in the government's brief in that case (October Term, 1913, Orig., p. 10), "From 1789 to 1890 there is no record of any attempt to review the decision of a collector or of the Secretary where the rate of duty imposed was alleged to be too low, and no such right exists at this time."

In 1922, Congress enacted a limited statutory exception to the general rule established in Louisiana v. McAdoo, supra. It allowed domestic manufacturers to intervene in proceedings to establish the value and tax classification of imported goods. Act of September 21, 1922, c. 356, 42 Stat. 859, Sec. 516. However, the courts have uniformly held that, apart from cases arising under the Section 516 manufacturers' protest statute, they have no jurisdiction to entertain third-party suits challenging an allegedly too favorable tax treatment of another. Feltex Corporation v. Dutchess Hat Works, 71 F. 2d 322, 328 (Cust. & Pat. App., 1934); Calf Leather Tanners' Ass'n v. Morgenthau, 80 F. 2d 536 (C.A. D.C., 1935); Morgantown Glassware Guild v. Humphrey, 236 F. 2d 670 (C.A. D.C., 1956); see also J.C. Penney Company v. United States Treasury Dept., 439 F. 2d 63 (C.A. 2, 1971), cert. denied, 404 U.S. 869 (1971).

See Paul, Taxation in the United States (1954), pp. 665-666; Eisenstein, Some Iconoclastic Reflections on Tax Administration, 58 Harv. L. Rev. 477, 526-527 (1945). Congress itself has recognized this need for centralized control and supervision by establishing the Joint Committee on Internal Revenue Taxation to provide Congressional oversight of Treasury revenue policies. See Code Sections 8001, 8002, 8021 and 8022 of the Code.[13/]

Despite these long-standing, forceful and numerous indications of Congressional intent to withhold general equity review of Treasury activity from the Judicial Branch, the Court of Appeals in Eastern Kentucky simply dismissed these statutes and decisions out of hand, without specific elaboration, stating conclusorily that "We find no 'clear and convincing evidence' that Congress intended to preclude judicial review in a case such as this." 506 F. 2d, p. 1285. The Supreme Court's Louisiana v. McAdoo decision was similarly disregarded as merely an obsolescent sovereign immunity decision, with no attempt to apply the Court's underlying rationale respecting the disruption and chaos which would follow a decision allowing any individual or group judicially to mandate the Treasury to collect higher taxes from

13/ In addition, several other Congressional committees exercise constant vigilance over specific areas of revenue administration. Indeed, the Treasury Department advises that during the period January 1974 through June 1975, the Commissioner of Internal Revenue alone made 29 appearances before Congressional committees in connection with legislative inquiries into Internal Revenue Service policies.

other taxpayers.[14] Id., pp. 1282-1283. Indeed, neither in Eastern Kentucky nor here is there alleged to be any general arbitrary or capricious policy of the Internal Revenue Service respecting the allowable charitable activities of tax-exempt organizations. Instead, plaintiff here complains of the Treasury's failure to revoke exemptions because of certain alleged specified errors in the organizations' activities. Yet it seems obvious that if any individual or group can utilize coercive injunctions to direct the Treasury Department's enforcement resources toward the plaintiff's own particular area of interest, organized and co-ordinated enforcement activity will be severely impaired. Because of the express Congressional and Supreme Court pronouncements respecting the preservation of effective administration of the revenue system upon which the Government depends, the District of Columbia Circuit's total and conclusive reliance on general principles of judicial review is not sufficient. [The] "Founding Fathers [did not] intend * * * to set up * * * an Athenian democracy or a New England town meeting

[14] The Eastern Kentucky Court of Appeals made little effort to distinguish the force of Louisiana v. McAdoo, supra, stating (506 F. 2d, pp. 1282-1283) that "since * * * [1914] significant changes have occurred in the area of standing, and exceptions to the doctrine of sovereign immunity have been judicially recognized * * *." But the Court has cited Louisiana v. McAdoo, supra, without question or disapproval in Dalehite v. United States, 346 U.S. 15, 34, fn. 30 (1953); Aircraft & Diesal Corp. v. Hirsch, 331 U.S. 752, 763, fn. 18 (1947); Switchmen's Union v. Board, 320 U.S. 297, 303 (1943); Arizona v. California, 298 U.S. 558, 572 (1936); Oregon Basin Oil & Gas Co. v. Work, 273 U.S. 660, 661 (1927); and Johnson v. McAdoo, 244 U.S. 643 (1917). It was also cited in dissenting opinions in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 710, n. 2, 716, 729 (1949); and in Anti-Fascist Committee v. McGrath, 341 U.S. 123, 204-205 (1951).

to oversee the conduct of the National Government by means of lawsuits in federal courts." United States v. Richardson, 418 U.S. 166, 179 (1974).

B. Plaintiff has no standing to challenge the Treasury's administration of the exempt organization tax provisions

In essence, plaintiff's contention is that he, as a private citizen, should be allowed to invoke the Judiciary's injunctive power, in order to force Treasury enforcement personnel to impose an affirmative action anti-discrimination requirement on the foundation defendants -- and ultimately all similarly situated foundations. Under plaintiffs' theory, such standards would necessarily require withdrawal of tax exemptions. We submit, however, that no private citizen has standing to mandate a stricter tax audit or assessment policy or higher tax collections from others, for the same reason that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Just as a railroad passenger has no standing to sue AMTRAK to challenge route changes when enforcement of the AMTRAK statutes has been committed to the Attorney General (Passenger Corp. v. Passenger Assn., 414 U.S. 453 (1974)), so here plaintiff cannot bring suit as a private Internal Revenue Commissioner to alter the enforcement of the revenue statutes.

The federal revenue statutes are designed to serve the uniquely general and public interest of financing all

governmental activities; they do not bestow private benefits on particular groups which can serve as the basis of private suits or causes of action. In that sense, the Treasury Department is much like other public agencies whose decisions respecting enforcement priorities and standards have been held immune from judicial review at the instance of private parties. For example, besides prosecuting authorities (Linda R.S., supra; Confiscation Cases, 7 Wall. 454 (1868)), it has been held that decisions not to bring enforcement or compliance proceedings are immune from judicial review in the case of the Federal Trade Commission (Federal Trade Comm. v. Klesner, 280 U.S. 19, 25 (1929)); the National Labor Relations Board (Vaca v. Sipes, 386 U.S. 171, 182 (1967)); and the Securities and Exchange Commission (Dyer v. Securities and Exchange Commission, 291 F. 2d 774 (C.A. 8, 1961)).

Even when private plaintiffs have alleged the failure of federal prosecuting authorities to enforce civil rights laws, this and other Courts have held that the prosecutors' enforcement decisions are immune from judicial review. Inmates of Attica Correctional Facility v. Rockefeller, 477 F. 2d 375, 379-380 (C.A. 2, 1973); Weisberg v. U.S. Department of Justice, 480 F. 2d 1195, 1201 (C.A. D.C., 1973) (en banc)); Newman v. United States, 382 F. 2d 479 (C.A. D.C., 1967) (Judge Burger)); Moses v. Kennedy, 219 F. Supp. 762 (D.C. D.C., 1963), aff'd per curiam

sub nom. Moses v. Katzenbach, 342 F. 2d 931 (C.A. D.C., 1965).[15/] This same immunity has been extended to the enforcement authority of the Commissioner of Internal Revenue. Milliken v. Stone, 7 F. 2d 397, 399 (S.D. N.Y., 1925), aff'd 16 F. 2d 981, 983 (C.A. 2, 1927), cert. denied, 274 U.S. 748 (1927); cf. Touhy v. Ragen, 340 U.S. 462, 468-470 (1951). Indeed, at bottom the Louisiana v. McAdoo and Dorsheimer decisions, supra, rest on this premise. When it is considered that the Treasury Department administers the largest revenue collection agency in the world, and that proper and expert allocation of resources is essential to achieve the indispensable revenue upon which all Government operations depend, the adjudication of private enforcement suits would be totally catastrophic and intolerable.

C. This suit is barred by the Anti-Injunction and the Declaratory Judgment Acts

Apart from the evidence throughout the Internal Revenue Code that Congress has vested the administration of the tax

15/ These cases involving distinctly public governmental enforcement bodies must be distinguished from cases allowing private parties to challenge agency enforcement action respecting statutes enacted expressly to benefit the plaintiff and similary situated individuals. E.g., Adams v. Richardson, 480 F. 2d 1159 (C.A. D.C., 1973) (en banc)); Legal Aid Society of Alameda County v. Brennan, 381 F. Supp. 125 (N.D. Calif., 1974); see Bachowski v. Brennan, 502 F. 2d 79 (C.A. 3, 1974), reversed and remanded on other grounds sub nom. Dunlop v. Bachowski, 421 U.S. 560 (1975).

laws exclusively in the Department of the Treasury so as to preclude suits challenging the tax treatment accorded to other parties, there are two specific statutory prohibitions against this type of equity suit. First, this suit is barred by the Federal Anti-Injunction Act. Second, this action is prohibited by the Declaratory Judgment Act, 28 U.S.C. 2201, which bars any declaratory suit "with respect to Federal taxes."

1. The Anti-Injunction Act. The Anti-Injunction Act, 26 U.S.C. 7421(a) provides, with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867[16] in order to prevent the same type of injunctive suit which had swept over the state taxation systems from similarly inundating the federal system. The Supreme Court thereafter quickly recognized the Congressional policy which underlay the passage of the Act, namely, that if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government would be threatened. See State Railroad Tax Cases, 92 U.S. 575, 613 (1875); Cheatham v. United States, 92 U.S. 85, 89 (1875); Snyder v. Marks, 109 U.S. 189, 193-194 (1883). The barring of such suits is necessary to enable the Treasury Department effectively to discharge its duty of "superintend[ing]

16/ The statute originated as Section 10 of the Act of March 2, 1867, 14 Stat. 475, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

the collection of the revenue * * *" which the First Congress delegated to it. See Act of September 2, 1789, c. 12, 1 Stat. 65, Section 2. This includes a wide variety of administrative acts, including the acceptance of tax returns for filing, audits of returns, and promulgation of Regulations and Revenue Rulings.

Recently, in Bob Jones University v. Simon, 416 U.S. 725 (1974), the Court reaffirmed the specific prohibition of the Anti-Injunction Act against equity suits interfering with the process of collecting taxes. There, a tax-exempt organization brought suit to enjoin the Commissioner's revocation of its exempt status. In holding that such a claim was barred by the Act, the Court stated that the language of the statute--"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court * * *"--"could scarcely be more explicit" (416 U.S., p. 736). As the Court pointed out (id., p. 742), this literal reading of the Act was consistent with its earlier decisions during the first half century of the Act's existence, which applied the broad prohibition without regard to the character of the tax, the nature of the challenge, or the effect of collection upon the taxpayer. See Snyder v. Marks, supra; Pacific Steam Whaling Co. v. United States, 187 U.S. 447 (1903); Dodge v. Osborn, 240 U.S. 118 (1916).

The Eastern Kentucky Court of Appeals held that the bar of the Anti-Injunction Act was not applicable to that case because

the plaintiff welfare recipients did not seek to restrain the "assessment or collection" of any tax, but rather sought to increase the amount of taxes which would be paid by any hospital which did not provide a full range of medical services for the indigent. (506 F. 2d, pp. 1283-1284.) But that ruling ignores the Court's statement in State Railroad Tax Cases, supra, 92 U.S., p. 613, that the Act was intended to prevent judicial interference "with the process of collecting the taxes on which the Government depends for its continued existence" (emphasis supplied). The "process" of tax collection by the Department of the Treasury includes the making of administrative determinations respecting the standards for exempting organizations from tax, and the scope and literalness with which such standards will be enforced. As the Tenth Circuit recently held in Cattle Feeders Tax Committee v. Shultz, 504 F. 2d 462 (1974), the Anti-Injunction Act bars any suit by a non-taxpayer to enjoin tax administrative activities which would affect the tax liability of others.

Moreover, the word "restrain" in the Anti-Injunction Act does not necessarily limit the Act's application to those suits seeking to "lower" or "reduce" tax collections, as Eastern Kentucky held (506 F. 2d, p. 1284). That term means "to limit or restrict to * * * a particular action or course * * *." See Webster's Third New International Dictionary, p. 1936. Since plaintiffs seek to limit or restrict the Treasury's policies respecting the effect of discrimination on tax-exemption administration -- indeed to limit the precise organizations to which exempt status may be

accorded -- they do in fact seek to "restrain" the assessment and collection of taxes within the meaning of the Anti-Injunction Act.

Indeed, the broad type of equitable relief which plaintiffs seek in this action is even more threatening to the orderly administration of the revenue laws than injunctive actions by taxpayers with respect to their own liabilities. While an injunctive action brought by an individual taxpayer attempts to affect the assessment and collection of his taxes alone, this suit in effect would require establishment of an entire affirmative action non-discrimination program, and would require extensive audits and other administrative actions. If the courts regularly entertained such injunctive suits seeking a particular affirmative tax administrative action against other taxpayers, brought by persons whose own tax liabilities were not at issue, it can hardly be doubted that the Treasury's activities in other more fruitful areas of enforcement would have to be curtailed, to the detriment of revenue collections generally. See Moore v. Miller, 5 App. D.C. 413, 419 (1895), appeal dismissed, 163 U.S. 696 (1895).

It would be anomalous to impute to Congress the intent to bar injunctive actions by taxpayers who are directly affected by the collection of their tax liability, but to permit non-taxpayers whose interests are far more tangential to enjoin the administrative determinations of the Treasury and thereby affect the

tax liabilities of countless numbers of taxpayers. The prohibition of the Anti-Injunction Act against judicial interference with the actions of the tax collector should apply to both taxpayer and non-taxpayer alike.[17]

2. The Declaratory Judgment Act. This suit is also barred by the Declaratory Judgment Act, 28 U.S.C. 2201, which bars any declaratory suit "with respect to Federal taxes." Section 2202 expands this prohibition by providing that the statute applies to any "further necessary or proper relief based upon a declaratory judgment or decree * * *." The latter provision encompasses injunctions in aid of the declaration of rights, as well as the declaration itself. S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6. Since plaintiffs seek a declaration as to the tax liabilities of numerous foundations -- both past and future -- together with an injunction in support of the declaration, the relief they seek is barred by the express terms of the tax exception to the Declaratory Judgment Act, regardless of the application of the Anti-Injunction Act.

In Bob Jones University v. Simon, supra, 416 U.S., pp. 732-733, fn. 7, the Court did not resolve the question whether the

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17 Only Congress can modify the statutory proscription barring non-taxpayer equity suits against the Internal Revenue Service. Thus, for example, Congress has recently enacted a statute, incorporated as Section 7476 of the Internal Revenue Code (26 U.S.C.), allowing the Pension Benefit Guarantee Corporation, employees, plan administrators, and employers to obtain declaratory judgments in the Tax Court with respect to qualifications of pension plans. The statute also permits intervention by the Secretary of Labor. See H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., pp. 331-332.

tax exception of the Declaratory Judgment Act has a broader reach than the Anti-Injunction Act. The Eastern Kentucky Court of Appeals, therefore, felt free to follow the non-final McGlotten decision, supra, p. 453, and refused to give the Declaratory Judgment Act any significance independent of the Anti-Injunction Act, reasoning that the two statutes "were intended to be coterminous" (506 F. 2d, p. 1285). We submit that the conclusion of the Eastern Kentucky Court of Appeals fails to give meaning to the words of the Declaratory Judgment Act and its legislative history and departs from or misreads the applicable precedents.

The tax exception to the Declaratory Judgment Act was placed in the statute about one year after its original enactment.[18] It was inserted in response to a flood of suits declaring the "processing" taxes unconstitutional or inapplicable. See Borchard, Declaratory Judgments (1941 ed.), pp. 850-857. The Senate Report on the prohibitory amendment noted that these cases represented a departure from precedents under the Anti-Injunction Act, and that it was necessary to preserve tax "determination[s]," as well as assessments and collections, free of judicial interference apart from the statutory review system (S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939-1 Cum. Bull. (Part 2), pp. 651, 657-658)):

18/ The amendment was contained in Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014.

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts afford ample remedies for the correction of tax errors. [Emphasis supplied.]

Thus, even assuming, arguendo, that the phrase "assessment and collection" in the Anti-Injunction Act does not encompass plaintiffs' attempt to obtain a judicial declaration as to the tax liabilites of various foundations, this case, nevertheless, falls within the broader statutory phrase "with respect to Federal taxes" in 28 U.S.C. Section 2201 and concerns the "determination" of Federal taxes, within the meaning of the Senate Committee's use of that term. See Bittker and Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L.J. 51, 58 (1972). Indeed, the leading commentator on the Declaratory Judgment Act has acknowledged that the tax exception was based upon a broad rationale which "denies the

possibility of challenging federal taxes of any kind on any ground by declaratory action." Borchard, supra, p. 855.[19]

The Eastern Kentucky Court of Appeals' reliance on McGlotten for the coterminousness of the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act is clearly mistaken. As noted above, the Supreme Court in Bob Jones, 416 U.S., pp. 731-732, fn. 6, rejected the McGlotten premise that the Declaratory Judgment Act does not apply where the plaintiff "does not contest the amount of his own tax" (McGlotten, supra, p. 453). Further, this Court in Jolles Foundation v. Moysey, supra, rejected the other McGlotten premise (338 F. Supp., pp. 453-454) that the tax exception was no bar where refund or Tax Court action relief was not available to the plaintiff. In Jolles Foundation, the plaintiff alleged that it had, and would have, no income, so that it would never incur the tax liability necessary for a refund or Tax Court action.[20] This Court, nonetheless, held that the tax exception barred the suit. Indeed, in the recent American Friends Service Comm. case, supra, the Anti-Injunction Act--whose scope the Declaratory Judgment Act tax exception at least equals (Bob Jones, supra, pp. 732-733, fn. 7)--was held to apply despite the absence of any other judicial remedy for the plaintiffs.

19/ The tax exception to the Declaratory Judgment Act was enacted at the request of the Department of Justice to exclude from the scope of the Act "all actions involving ' ederal taxes.'" Borchard, supra, p. 850. Assistant Attorney General Wideman told the Senate Finance Committee "that Congress intended to apply the Act to matters of private law" and that "tax matters were intended to be excluded" (ibid.).

20/ See Br. for Appellant, Jolles, supra (C.A. 2, No. 110-275), p. 16.

In holding (506 F. 2d, p. 1285) that the tax exception to the Declaratory Judgment Act was "coterminous" with the Anti-Injunction Act, the Eastern Kentucky Court of Appeals also relied upon its prior decision in "Americans United", Inc. v. Walters, 477 F. 2d 1169 (C.A. D.C., 1973), rev'd on other grounds sub nom. Alexander v. "Americans United", Inc., 416 U.S. 752 (1974), which in turn also relied upon a line of cases beginning with Tomlinson v. Smith, 128 F. 2d 808, 811 (C.A. 7, 1942). But the Tomlinson case and most of its progeny actually support a contrary conclusion.

In Tomlinson, a non-taxpayer third-party--a trustee of partnership property--sought injunctive and declaratory relief preventing the Commissioner from levying on partnership property to satisfy the tax liability of another taxpayer, i.e., the plaintiff in his capacity as an individual partner. The court initially held that the Anti-Injunction and the Declaratory Judgment Acts were "co-extensive" in the sense that they did not prohibit suits by non-taxpayers to enjoin levies on their property to satisfy the tax liabilities of other taxpayers. That holding is now codified in Section 7426 of the Internal Revenue Code. (26 U.S.C.)

The court went on to hold, however, that the non-taxpayer plaintiff's attempt to obtain a declaration as to the tax liability of the taxpayer was barred by the tax exception to the Declaratory Judgment Act. The same distinction was made in Bullock v. Latham, 306 F. 2d 45 (C.A. 2, 1962), and in

Jules Hairstylists of Maryland v. United States, 268 F. Supp. 511, 515 (Md., 1967), aff'd per curiam, 389 F. 2d 389 (C.A. 4, 1968), cert. denied, 391 U.S. 934 (1968). Plaintiffs' attempt to obtain a judicial declaration concerning the tax liabilities of other parties is, therefore, similarly barred by the "tax exception" to the Declaratory Judgment Act.

D. This action constitutes an unconsented suit against the United States and is barred by sovereign immunity

Inasmuch as plaintiff in effect seeks to require the Treasury Department to establish affirmative action standards forbidding racial discrimination by foundations, and in effect assessing penalty taxes against the defendant foundations here, one could hardly imagine a case which more directly "expend[s] itself on the public treasury * * * [and] interfere[s] with the public administration. Land v. Dollar, 330 U.S. 731, 738 (1947); see Dugan v. Rank, 372 U.S. 609, 620 (1963). As such, the plaintiff's injunctive suit "to compel * * * [the Government] to act" (Dugan v. Rank, supra) is an unconsented suit against the sovereign barred by sovereign immunity. In the words of Hawaii v. Gordon, 373 U.S. 57, 58 (1963), the suit is barred because "the order requested would require the * * * [Secretary's] official affirmative action [and] affect the public administration of government agencies."

As explained above, Louisiana v. McAdoo involved a similar attempt by a non-taxpayer to require the Treasury Department to

assess higher taxes against other taxpayers. The court's dismissal of the action was founded in part on its conclusion that such suits are barred by sovereign immunity (434 U.S., p. 632):

> Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the * * * [taxing statute] would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States. [Emphasis supplied.] 21/

Similarly, in Jolles Foundation v. Moysey, 250 F. 2d 166 (C.A. 2, 1957), this Court, in an alternative holding, held that a suit by a foundation to require the Internal Revenue Service to reinstate its name on the list of Section 501(c)(3) exempt organizations was likewise barred by sovereign immunity. 22/ As explained above, the same conclusion was reached by the Tenth Circuit in the Jr. C. of C. case, supra, a suit demanding revocation of another's tax exemption on the basis of the latter's alleged sex discrimination. Similarly, in Divonne v. Internal

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21/ See footnote 12, supra.

22/ The Court stated (p. 169) that "the district court was without general original jurisdiction to issue an order compelling a public official to act with respect to his official duties," citing two sovereign immunity cases; Wilson v. Wilson, 141 F. 2d 599, 600 (C.A. 4, 1944) and Marshall v. Crotty, 185 F. 2d 622, 628 (C.A. 1, 1950). The Wilson case had been cited in support of the sovereign immunity defense in the Government's appellate brief. Br. for the Appellee, Jolles Foundation v. Moysey (C.A. 2, No. 110-275, p. 7).

Revenue Service, 75-2 U.S.T.C., par. 9619 (S.D. N.Y., July 16, 1975), the court held that a suit by an informer to require the Internal Revenue Service to allow him a reward was barred by sovereign immunity.

It is true that in Kletschka v. Driver, 411 F. 2d 436, 445 (C.A. 2, 1969), this Court held that 38 U.S.C. Section 1110 expressly mandated a disciplinary hearing for the plaintiff-employee, that Section 703 of 5 U.S.C. permitted judicial review if the hearing was not granted, and that to that extent sovereign immunity was waived. The instant case is clearly distinguishable, however, since no statute requires the Treasury to establish an affirmative action non-discrimination policy in the area of tax-exempt organization supervision, or at least a policy which would accord plaintiff the benefits which he seeks. Moreover, plaintiff does not even ground his judicial review claims on 5 U.S.C., Section 701. Finally, as explained above, equitable review of tax administration is expressly precluded by Congressional enactments and settled judicial authority, so that the general judicial review provisions cannot apply (see 5 U.S.C. § 701(a)(1), (2)).[23]

23/ The Government's position is that 5 U.S.C, Section 701 is not itself a waiver of sovereign immunity in any event. E.g., Cyrus v. United States, 226 F. 2d 416 (C.A. 1, 1955). However, in view of the controlling authority of Jolles and Louisiana v. McAdoo applying sovereign immunity here, that issue need not be reached.

III

ASSUMING THE DISTRICT COURT HAD JURISDICTION OVER THE FEDERAL DEFENDANTS, THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT

A. The standard of review

The District Court granted the motions of all defendants to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted. Rule 12(b)(6), Federal Rules of Civil Procedure. The last sentence of Rule 12(b) provides that if extraneous materials outside the pleadings are presented and not excluded by the court, the motion to dismiss shall be treated as a motion for summary judgment. In this case, the record contained four depositions of plaintiff and fourteen affidavits which the District Court considered in granting the motions (R. Third page). In reviewing such a dismissal, the appellate court should treat the dismissal as a summary judgment.[24] Compania De Remorque Salvamento v. Esperance, Inc., 187 F. 2d 114 (C.A. 2, 1951); Thompson v. New York Central Railroad Co., 361 F. 2d 137, 144 (C.A. 2, 1966).

In Jackson v. Statler Foundation, supra, p. 634, this Court ordered the District Court to determine on remand whether the appellee foundations were dependent upon federal and state tax

[24] In Larson v. American Airlines, 313 F. 2d 599 (C.A. 2, 1963), the District Court judge expressly stated he was not granting summary judgment because he had not read the extraneous material (affidavits). This Court held the acceptance of extraneous material in the form of affidavits converted the motion to summary judgment and reviewed the dismissal as a summary judgment. Thus, for purposes of this appeal, the dismissal of the complaint should be treated as a summary judgment in favor of the defendants-appellees.

exemptions and whether that status carried connotations of governmental action. If such "state action" were found, the opinion noted that the District Court should then address plaintiff's allegations of racial discrimination. The question of "state action" is an issue in which the federal defendants have no litigable interest, and which should properly be addressed by the private parties to this appeal. Insofar as the federal defendants are concerned, the relief sought against them in the complaint -- withdrawal of the foundations' tax-exempt status because they allegedly discriminate (Amended Compl. par. 4), and an audit of the foundations' books and the assessment of taxes because they are not exempt from taxes -- is predicated upon a finding of racial discrimination by the foundation defendants. Thus, we here address only the question of whether summary judgment (or dismissal of the complaint) in favor of the federal defendants was proper. Such summary judgment in favor of the federal defendants was proper if there are no facts in the record which would sustain a claim of racial discrimination, even assuming, arguendo, that the activities of the foundations constituted "state action" (see, e.g., Jackson v. Statler Foundation, supra, pp. 634-635; fn. 1, p. 637 (dissent)).

B. Summary judgment was properly granted on the basis of the record before the District Court

The salutary purpose of summary judgments is to allow a case to be disposed of without a trial where there exists no genuine issue of material fact. Wright and Miller, Federal Practice and Procedure, § 2712. Rule 56, Federal Rules of Civil

Procedure, contemplates the establishment of facts by depositions, admissions, and affidavits, and if the established facts show no material factual issue exists, summary judgment may appropriately be entered. In furtherance of this purpose, Rule 56(e) provides that --

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

In response to the complaint, the foundation defendants and the federal and state defendants filed motions to dismiss or for summary judgment. The foundation defendants filed affidavits, all of which stated that they did not discriminate; that their grants were made in accordance with the governing provisions of the respective trusts creating the foundations, without regard to the race of the recipients; that substantial grants had been made to black or black oriented organizations (e.g., the NAACP defense fund (Baird Affidavit, in support of the motion for summary judgment on behalf of the Cameron Baird Foundation)); and that to make individual grants to plaintifff or scholarship grants to his children would subject the foundations to the excise taxes on such grants provided in Section 4942 and 4945 of the Internal Revenue Code (26 U.S.C.). Plaintiff (R. Third Page) failed to respond to these affidavits by counter affidavits, oral testimony or in any other manner.

As quoted above, Rule 56(e) virtually mandates summary judgment in favor of the movant if the record before the court shows no issue of fact exists and the party against whom summary judgment is sought does not produce facts, but merely rests on the allegations in his complaint. This Court has held (Beal v. Lindsay, 468 F. 2d 287, 291 (1972)) that the use of summary judgment is not restricted to situations where there is not the "slightest doubt as to the facts, but rather, is properly granted when the movant established facts and the opponent does not counter those facts. The court held (468 F. 2d, p.291):

> When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts.

Upon the failure or refusal by the opponent to produce such facts, there is no factual dispute which would require a judge or jury to resolve differing versions of the facts at a trial. First National Bank of Arizona v. Cities Services, 391 U.S. 253, 288-289 (1968). The facts in this record, established by the foundations' affidavits, show the foundations do not discriminate. Summary judgment was therefore proper.

Even assuming, however, that plaintiff had responded to the affidavits with the evidence which he had indicated would prove his case, he still would not have proved discrimination as a matter of law. Summary judgment in favor of the federal defendants, in that event, would still have been proper.

The substance of appellant's complaint was that the foundations discriminated against him and his class[25] because they denied him employment on account of his race; that on account of his race, they refused to invest in businesses he either sponsored or championed; and that they refused to distribute their funds on an equal basis to blacks.(Amended Compl. par. 3.)

Plaintiff's basis for his job discrimination contention, however, is an impression (See Jackson Jan. 12, 1972 Dep. 49-50) that he has established job discrimination per se, since none of the foundation defendants have any black employees or directors. His purported authority is an uncited case entitled Clark v. Bethlehem Steel, which supposedly holds that nothing more is necessary (see Jackson Jan. 12, 1972 Dep. 90-92) to establish job discrimination.[26] However, under Sections 201 et seq. of the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 §§ 2000, et seq.), a complainant such as Plaintiff (see Amended Compl. par. 1) must establish a prima facia case of discrimination in order to prevail

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25/ Although the amended complaint seeks the same relief for all members of the plaintiff's alleged class -- the black race -- nowhere does plaintiff establish that he has complied with the prerequisites of Rule 23, Federal Rules of Civil Procedure, for the maintenance of a class action. With the exception of a claim for damages in the amount of $10,000 each for members of the class, there is no requested relief for class members. The alleged discrimination, moreover, all stems from purported discrimination against plaintiff rather than against other class members. Therefore, we treat this as an individual suit by plaintiff rather than as a class action, for there is no proof in the record to indicate any other member of the purported class has any interest in this action whatsoever.

26/ The holding in that case, United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 993 (W.D. N.Y., 1970), has been taken out of context by plaintiff in order to establish discrimination per se

by showing: (i) that he is a member of a racial minority; (ii) that he applied for a job and was qualified for the job for which the employer was seeking an applicant; (iii) that despite his qualification he was rejected; and (iv) that after the rejection of his application the position remained open and the employer continued to seek applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973). Plaintiff here established the first of these factors, but in almost four years of litigation has not offered to prove the other three factors. His sole attempt to link himself to discrimination by the foundations was a statement in one of his form letters asserting that he "would like to become a director of your foundation." Plaintiff's job discrimination claim, thus, does not contain the required elements of established discrimination under McDonnell Douglas Corp. v. Green, supra.

As to the allegations that the foundations refused to invest in black businesses and refused to give grants to blacks, plaintiff asserted (Jackson Jan. 12, 1972 Dep. 96) that he would adduce appropriate proof by means of "reports" which the foundations had submitted to the Internal Revenue Service. Even had plaintiff introduced such reports into evidence, however, his case would not have been proved. Nowhere has plaintiff specified how unspecified reports that tax exempt foundations are required to submit to the Internal Revenue Service could establish discrimination against

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26/ (continued)
against him. The quote merely addresses the burden of proof necessary to show that a seniority system does not fall within the exemption provided for seniority systems Civil Rights Act of 1964, Sec. 703 (42 U.S.C. § 2000e-2(h)), which are bona fide and not the result of an intention to discriminate. In that context, all that is necessary to show an intent to discriminate is to show that the conduct establishing the discrimination is not the result of accident or mistake. See also Local 189, United Papermak & Paperwork v. United States, 416 F. 2d 980, 995, fn. 15 (C.A. 5, 1969) In both cases, unlike here, discrimination was already established, and the question was whether the seniority system in question should be modified because its establishment was not the result of mistake.

plaintiff (or against his class, for that matter) in any way whatsoever. Plaintiff continually refused to state what other evidence he would introduce to substantiate his claims.[27/]

The sum and substance of his allegations is that since the foundations refused to hire him or give him grants they discriminated against him. He is black, and under his theory the discrimination is, therefore, racial and, thus, actionable. Even if he had introduced the evidence which he theorizes would prove his case, there would still not be sufficient evidence to support his allegations. What the record does show is a suit conveived before any facts were established, a series of form letters sent to numerous foundations, and a corresponding attempt to establish per se discrimination solely on the alleged failure to respond to those form letters. (Jackson Jan. 12, 1972 Dep. 68). Plaintiff's recollection of the time letters were mailed, and phone calls were made, and the substance of those letters and calls, was vague, confused, and contradictory from one deposition to another.

In sum, had plaintiff presented all the evidence he indicated he would produce, he would not have established racial discrimination on the part of the foundation as a fact. Since the relief sought in the amended complaint against the federal defendants is predicated on a finding of racial discrimination, and since the facts plaintiff sought to prove would not establish such discrimination, no relief could be granted against the federal

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27/ Plaintiff's claim (Amended Compl. par. 24) that the foundation defendants engage in prohibited discrimination because they do not give hospital free care to indigents, must be dismissed since plaintiff has never alleged that he has been denied free care.

defendants. Dismissal of the complaint vis-a-vis the federal defendants, or summary judgment in their favor (Larson v. American Airlines, supra), was proper.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed and the case remanded to the District Court with instructions to dismiss the amended complaint for lack of jurisdiction, insofar as the amended complaint seeks declaratory and injunctive relief against the federal defendants and the judgment dismissed such claims on the merits.[28] Alternatively, the judgment of the District Court should be affirmed.

Respectfully submitted,

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JANUARY 1976.

28/ It is well settled that if a complaint is dismissed on the merits in the court below, but should have been dismissed on jurisdictional grounds, the appellate court will vacate the judgment and order entry of a judgment dismissing the complaint for lack of jurisdiction. E.g., Shawnee Sewerage & Dr. Co. v. Stearns, 220 U.S. 462, 471-472 (1911); Smallwood v. Gallardo, 275 U.S. 56 (1927); Piedmont & Nor. Ry. v. United States, 280 U.S. 469 478 (1930); Gully v. Interstate Nat. Gas Co., 292 U.S. 16 (1934). It was not necessary for the Government to prosecute its own appeal to secure this jurisdictional dismissal. Peoria Ry. Co. v. United States, 263 U.S. 528, 536-536 (1924).

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on the appellant, appearing pro se, and each of the below named counsel for the other named appellees by mailing one copy thereof to each, on this ____ day of January, 1976, in envelopes, with postage prepaid, properly addressed to each of them, respectively, as follows:

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APPENDIX

Internal RevenuenCode of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

* * *

(c) [as amended by Sec. 201(a)(1)(B), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] Charitable Contribution Defined.--For purposes of this section, the term "charitable contribution, means a contribution or gift to or for the use of--

(2) A corporation, trust, or community chest, fund, or foundation--

* * *

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * *

(c) List of Exempt Organizations.--The following organizations are referred to in subsection (a):

* * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

* * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-718, 80 Stat. 1125] Tax.--Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * *

28 U.S.C.:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. * * *

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

TX-156 (Ed. 8-29-72)

CASE NO. 75-1618

UNITED STATES COURT OF APPEALS FOR THE Second CIRCUIT

..... Term, 19....

REVEREND DONALD L. JACKSON,

Appellant

vs.

STATLER FOUNDATION, et al.

Appellees

The Clerk will enter our appearances as Counsel for the Appellees

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